NO. 42879-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JASON MACK,

Appellant.

BRIEF OF RESPONDENT

JAMES B. SMITH
WSBA # 35537
Deputy Prosecutor
for Respondent

Hall of Justice
312 SW First
Kelso, WA 98626
(360) 577-3080

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I. PROCEDURAL HISTORY

The appellant was charged by information with intentional murder in the second degree and, in the alternative, felony murder in the second degree, while armed with a deadly weapon. CP 1. The charges stemmed from an incident that occurred on August 20th, 2009 at a bar in Longview, Washington, where the appellant fatally stabbed Brian Garner.

The appellant proceeded to jury trial on October 24, 2011. On November 3rd, 2011, after a nine day trial, the jury returned a guilty verdict for felony murder in the second degree, and found by special verdict the appellant was armed with a deadly weapon during the commission of this crime. The appellant was found not guilty of intentional murder in the second degree. The trial court subsequently sentenced the appellant to a standard range sentence of two hundred and forty months in prison. The instant appeal timely followed.

II. STATEMENT OF FACTS

On August 20th, 2009, Brian Garner and his girlfriend Tiffany Sheppler went out for a night on the town in Longview, Washington. After going to several other bars and restaurants, Mr. Garner suggested around midnight that they go to the Cross Keys tavern. Ms. Sheppler was initially reluctant to go to the Cross Keys, as she had been assaulted by an employee named Shawna at the bar about a week prior. However, Mr.

Garner assured her that he knew the bartender working that night and that it would be fine. RP 262-269.

After they arrived at the Cross Keys, Mr. Garner began socializing with a number of people at the bar while Ms. Sheppler went outside to a fenced smoking area. RP 270-271. Once outside, Ms. Sheppler sat at a table to smoke a cigarette. At the table were two other women, one, Tasheena Woodward, was the appellant's girlfriend, the other, Jamie Mack was the appellant's sister. RP 271-272. Ms. Sheppler began making conversation with Ms. Mack, and made mention of the prior incident where Shawna had assaulted her at the bar. Ms. Woodward overheard this, and became angry with Ms. Sheppler, as she was friends with Shawna, and cursed at her. Ms. Sheppler then went back inside the bar. RP 273-274.

About an hour later, Ms. Sheppler and Mr. Garner both went back outside to the smoking area. Ms. Mack and Ms. Woodward were still outside, along with a smaller white man with tattoos on his arms, a shaved head, and facial hair. RP 275-276. The man was the appellant, Jason Mack. Ms. Sheppler and Mr. Garner sat down near the two women and the appellant, and an initially friendly conversation began. However, Ms. Woodward began arguing with Ms. Sheppler again about the prior incident with Shawna. Mr. Garner then came to Ms. Sheppler's defense

and told Ms. Woodward to "shut up." Ms. Woodward did not respond well to this, and a verbal argument ensued between her and Mr. Garner. RP 276-278. During the argument, Mr. Garner insulted Ms. Woodward by calling her a vulgar name, which prompted the appellant to enter the dispute in defense of his girlfriend. The appellant was angry and wanted to fight Mr. Garner, who was trying to go back inside the bar. RP 279. Mr. Garner went inside the bar, followed by the appellant and two other men, Lee Pope and Tim Mitchell, who had been outside in the smoking area. RP 281.

As Mr. Garner entered the bar, an unrelated dispute began between him and Mr. Pope and Mr. Mitchell. RP 382. Mr. Garner and these two men began exchanging blows near the exit to the smoking area, close to a pair of pool tables. A friend of Mr. Pope and Mr. Mitchell, Andy Redmill, began walking over to assist his friends. As Mr. Redmill observed the fray, he saw the appellant, who he identified at trial and described as a small man, with tattoos on his arms, and wearing a white tank top enter the bar from the smoking area. Mr. Redmill watched the appellant insert himself into the brawl, breaking a beer bottle over Mr. Mitchell's head, and then make a stabbing motion towards Mr. Garner, striking the center of his chest. Mr. Redmill then saw the appellant bolt back out the door to

the smoking area. Mr. Redmill did not the see the appellant at the bar after that point. RP 383-389.

Two other witnesses testified to seeing the appellant stab Mr. Garner in the chest. Rhonda Naillon and Nicole Johnson were at the bar together that evening, and had just began playing pool when Mr. Garner, Mr. Pope, and Mr. Mitchell entered the bar from the smoking area and entered into a fistfight. Ms. Naillon testified that the appellant, who she identified at trial and described as a small man with multiple tattoos on his arms, entered the bar from the smoking area. Ms. Naillon watched the appellant make a stabbing motion towards Mr. Garner, who then began bleeding from the chest. Ms. Naillon then saw the appellant flee back outside to the smoking area. RP 501-512.

Ms. Johnson testified that she was playing pool with Ms. Naillon when the fight erupted between Mr. Garner, Mr. Pope, and Mr. Mitchell. While Mr. Garner was being beaten, Ms. Naillon testified she saw the appellant, who she identified at trial and described as a small man with tattooed arms, come in from the smoking area and make a single stabbing motion towards Mr. Garner's upper body. Ms. Johnson did not see the appellant at the bar after he struck Mr. Garner. RP 900-904.

Tasheena Woodward, the appellant's girlfriend at the time of the incident, also testified at the trial. Ms. Woodward stated she had engaged

in an argument with Ms. Sheppler, and then Mr. Garner out in the smoking area. Mr. Garner called Ms. Woodward an offensive name, in the presence of the appellant. RP 478-483. Ms. Woodward saw Mr. Garner go back into the bar, followed by the appellant and two other men. The appellant quickly came back to the smoking area and told her that he had to leave because "the cops were coming because that guy got hurt or something." RP 483. The appellant handed Ms. Woodward a small knife, which she hid on her person, and then fled by jumping over the fence around the smoking area. Ms. Woodward took the knife home with her. Ms. Woodward did not see the appellant again until he had been arrested and booked into jail. RP 483-485.

Leonard Jordan, another patron at the bar that evening, testified at the trial also. Mr. Jordan, also known as "Tattoo Jimmy", testified that he had been outside in the smoking area that evening when Ms. Woodward and Mr. Garner began arguing. Mr. Jordan was familiar with the appellant from the bar. RP 762-767. Mr. Jordan heard Ms. Woodward ask the appellant to help her, and then overheard the appellant join in the argument. RP 768. Mr. Jordan saw Mr. Garner walk away and go inside the bar. RP 769. A short time later, he then saw the appellant come out into the smoking area with a knife in his hand. Mr. Jordan saw the appellant trying to give Ms. Woodward the knife, which was around six

inches long. RP 770. Mr. Jordan also overheard the appellant telling Ms. Woodward "I hurt somebody." Mr. Jordan then went inside the bar and did not see the appellant again. RP 770-772.

After fleeing the scene of the crime, the appellant ran to a nearby trailer park where he asked a number of people for a ride. A resident of the trailer park, Kelly Mortenson, testified that when he was unable to convince anyone to drive him away, the appellant fled on foot towards his residence. RP 450-456. Another resident of the trailer park, Clinton Elliott, testified that the appellant, who was nervous, approached him and asked for a ride shortly after the stabbing. RP 466-467. Mr. Elliott then saw the appellant run across the street. RP 467-468. The next day, Mr. Elliott found some clothing hidden at the trailer park, he gave these items to the police. RP 469-470.

Subsequently, the items of clothing, a t-shirt and a pair of shorts, were submitted to the Washington State Patrol Crime Laboratory. A forensic scientist examined the shorts and found a number of blood stains, including inside the right front pocket. A DNA profile from this blood was found to match the DNA of Mr. Garner. A DNA profile was also developed of the wearer of the shorts, this profile was found to match the appellant. RP 835-873.

After dumping his bloody clothing at the trailer park, the appellant returned to his residence in Longview. He and Ms. Woodward had left their young child in the care of a friend, Christopher Richardson. Mr. Richardson testified that he was awakened in the early morning by a person entering the home through the rear door. The rear door was not normally used as an entrance, so Mr. Richardson was alarmed. Mr. Richardson struggled with the intruder until he realized it was the appellant. The appellant then told Mr. Richardson that "something had happened and he had to go" before kissing his baby goodbye and fleeing. RP 580-585.

After going to his residence, the appellant fled to Arizona. A warrant was issued for his arrest, and he turned himself into the local police in Bullhead City, Arizona. Detectives from the Longview Police Department traveled to Arizona, where the appellant told them he had turned himself in because the FBI had surrounded Ms. Woodward's home. The appellant then waived extradition and returned to Washington with the police. RP 743-746.

Back at the Crosskeys, Mr. Garner staggered around the interior of the bar for a time, before ultimately ending up outside on the sidewalk. There, he collapsed and was bleeding heavily. Mr. Mitchell and Mr. Pope came to Mr. Garner's assistance, and were attempting to provide him first

aid when the police arrived. RP 540, 283-284, 254. Mr. Garner was taken to the hospital, but soon succumbed to his injury. RP 800-802. An autopsy showed that Mr. Garner had been stabbed once in the heart, causing fatal bleeding. Further examination showed the knife blade had been driven forcefully through his sternum, up to the hilt of the blade. RP 949-958.

At trial, the State called a witness named Larry Lamson. Mr. Lamson testified that he was present when Ms. Woodward discussed giving a knife to Mr. Richardson for him to "get rid off." He stated Ms. Woodward had said the appellant had given her the knife initially. Mr. Lamson provided no other testimony of any substance. RP 796. On cross examination, Mr. Lamson admitted to suffering from visual and auditory hallucinations, an irrational fear of circles, and significant memory problems. RP 797-799.

The appellant had desired to impeach Mr. Lamson's testimony with the fact he had been prosecuted in 2010 for failing to register as a sex offender, and had received a plea bargain resulting in an exceptional sentence of 24 months. His standard range would have been 43-57 months. Mr. Lamson had provided a statement to the police during the initial investigation in 2009. The deputy prosecutor that was co-counsel in the appellant's case had prosecuted Mr. Lamson's case, but was not involved in the appellant's case at that point. There was no evidence that

Mr. Lamson's plea bargain was at all connected to his testimony against the appellant. RP 785-791.

The trial court excluded any cross-examination of Mr. Lamson on this issue, ruling that:

> Okay. Well, I agree that any mention of the failure to register would be improper. I think that's fairly prejudicial. Here we have the statements of Mr. Lamson in this case were allegedly made in September of '09. He is charged with a new criminal offense of the failure to register in 2010, June. And then, he pled guilty in October of 2010. Mr. Brittain was the assigned prosecutor to the Mr. Lamson case but was not involved in -- as second chair in this particular case.
>
> Um -- It's interesting because in a way the fact that he -- he got the exceptional down -- 43 to 57 is the standard range, and then it drops down to 24 months. You know, it raises the specter that something might be going on with this case. It also raises the specter that it could be an issue with a proof problem with the evidence in that particular case. There may be some issues related to witnesses. There's potential -- a potential for a great many things that would affect a plea negotiation. So, I think that's important to understand. And, I understand that the -- the inference is that there's -- you know, Mr. Lamson got a sweet deal because he was an important witness for the State.
>
> I guess the concern that I have is that without a clearer tie into this case, -- I think if there was a clearer tie in, if the plea negotiations or the plea offer says, you know, "Testify truthfully in the Mr. Mack case, then we are going to give you a sweet deal", I think without that, there's a lot of reasons why somebody could get an exceptional sentence down. Mr. Mulligan points out that there very well may be a policy in the prosecutor's office of supervisory approval for an exceptional sentence down. I don't know if that is the case. It could very well be.
>
> However, I think that the concern I have is that there is no clear connection to this case. There is -- and Mr. Mulligan is right that there is a wide discretion to cross-examine somebody to bias

> because that's how the jurors determine to believe somebody or not believe somebody. So, in this instance, because of that lack of clear tie in or even -- even a closer tie in, I'm going to grant that motion in limine.

RP 791-792.

As the case developed during trial, the sole issue in contention was the identity of the man who had killed Mr. Garner. The appellant argued at length that the State's witnesses had falsely accused him, and strongly stated that this was the result of collusion between the witnesses, the police, and the prosecution. RP 1059-1082. In rebuttal, the State pointed out the lack of any support for these theories, and urged the jury to base its decision on the actual evidence rather than the arguments of counsel. RP 1085-1097.

III. ISSUES PRESENTED

1. Did the trial court err by refusing to instruct the jury on manslaughter in the first degree as a lesser included offense?

2. Did the State engage in prosecutorial misconduct during closing argument that requires a new trial?

3. Did the trial court abuse its discretion by barring cross examination on an irrelevant and unsupported issue?

IV. SHORT ANSWERS

1. No.

2. No.

3. No.

V. ARGUMENT

I. The Trial Court Correctly Denied the Appellant's Request for a Lesser Included Offense of Manslaughter in the First Degree.

The appellant argues the trial court erred by refusing his request to instruct the jury on manslaughter in the first degree, which he proposed as a lesser included offense. However, as there was no evidence that showed only this crime had occurred, the trial court correctly declined the appellant's request.

A defendant is entitled to an instruction on a lesser included offense if the two-prong test articulated in State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978), is satisfied. Under the legal prong of the test, "'each of the elements of the lesser offense must be a necessary element of the offense charged.' " State v. Fernandez-Medina, 141 Wn.2d 448 , 454, 6 P.3d 1150 (2000) (quoting Workman, 90 Wn.2d at 447-48.) Under the factual prong, evidence in the case must support an inference that solely the lesser crime was committed to the exclusion of the charged offense. Fernandez-Medina, 141 Wn.2d at 455. This factual showing must be "more particularized than that required for other jury instructions." Id.

Where a trial court refuses to give an instruction based on the facts of the case, appellate review is for an abuse of discretion. State v. Lucky,

128 Wn.2d 727, 731, 912 P.2d 483 (1996); State v. Hunter, 152 Wn.App. 30, 43, 216 P.3d 421 (2009). An abuse of discretion occurs only when the trial court's decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); quoting State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The standard of review has been described in detail as:

> Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.
> State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775, 784

(1971); see also State v. Batten, 16 Wn.App. 313, 314, 556 P.2d 551 (1976). In short, discretion is abused only where it can be said no reasonable man would take the view adopted by the trial court. State v. Derefield, 5 Wn.App. 798, 799-800, 491 P.2d 694 (1971).

Here, the State agrees with the appellant that manslaughter in the first degree met the legal prong of the Workman test for intentional murder in the second degree. See State v. Berlin, 133 Wn.2d 541, 550-51, 947 P.2d 700 (1997). However, this alone is not sufficient, as the specific facts of the case must support an inference that *only* the proposed lesser

crime occurred. Indeed, to satisfy the factual prong, there must be "substantial evidence that affirmatively indicates" the lesser crime was committed to the exclusion of the greater offense. Berlin, 133 Wn.2d at 541. "It is not enough that the jury might simply disbelieve the State's evidence. Instead, some evidence must be presented which affirmatively established the defendant's theory on the lesser included offense before an instruction will be given." State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990).

In State v. Perez-Cervantes, 141 Wn.2d 468, 6 P.3d 1160 (2000), the defendant was charged with murder in the second degree from an incident where he fatally stabbed a man. The defense requested the jury be instructed on manslaughter in the first degree as a lesser offense, however the trial court denied this request. The Supreme Court upheld this ruling, noting that the evidence at trial showed the defendant had intentionally stabbed the victim after he had been beaten. Perez-Cervantes, 141 Wn.2d 481. The Supreme Court noted that there was no evidence affirmatively established the defendant had acted recklessly rather than intentionally in "plunging the blade of his knife" into the victim. Id. at 481-82. Absent this showing, the factual prong was not satisfied for manslaughter as a lesser offense. Id.

Similarly, in State v. Hernandez, 99 Wn.App. 312, 997 P.2d 923 (1999), the trial court refused to instruct the jury on manslaughter as a lesser offense to murder. There, the defendant was charged with fatally shooting his girlfriend. The defendant offered a number of vague and conflicting accounts to the police of what had occurred, including a claim that the "gun had went off" and the victim may have committed suicide, but failed to provide a description of what he did to cause the death. The Court of Appeals ruled that, as there was no affirmative evidence the defendant acted recklessly rather than intentionally, the factual prong was not satisfied and manslaughter was not a lesser included offense. The court noted that even though there was some vague evidence the death was not the result of an intentional act by the defendant, the defendant's defense actually amounted to a claim of excusable homicide, rather than that a manslaughter had been committed to the exclusion of murder. Hernandez, 99 Wn.App. at 320-21.

State v. Hunter, 152 Wn.App. 30, 216 P.3d 412 (2009), provides an example of a case where there was a sufficient factual showing to instruct the jury on manslaughter as a lesser offense to murder in the second degree. In Hunter, the defendant was charged with fatally shooting his girlfriend. The defendant had called 911 and stated he was suicidal because he had accidentally killed the victim. The defendant went on to

testify that he had shot the victim in the face, but that it was an accident caused by his confusion over how to operate the safety and whether the gun was loaded. 152 Wn.App. 45-46. The appellate court found the trial judge had erred by denying the request for manslaughter as a lesser included offense, as there was ample affirmative evidence that the defendant had caused the death by to reckless rather than intentional acts. Id. at 47.

Here, the trial court ruled that, although the legal prong of the Workman test was satisfied, the evidence did not affirmatively support the conclusion that only the proposed lesser offense of manslaughter had been committed to the exclusion of murder in the second degree. Thus, the trial court ruled that, based on its review of the evidence, the factual prong of Workman was not satisfied and refused to instruct the jury on manslaughter as a lesser included offense. RP 994-995. As the trial court's decision was predicated on its assessment of the facts at trial, the standard of review is for an abuse of discretion. Hunter, 152 Wn.App. at 43.

The evidence at trial established, based on three eyewitnesses to the stabbing, that the appellant had intentionally stabbed Mr. Garner while he was being beaten and assaulted by Mr. Pope and Mr. Mitchell. RP 383-389, 501-512, 900-904. The witnesses at the scene all agreed that

the appellant had been involved in an argument with the victim immediately prior to the stabbing, due to Mr. Garner having called the appellant's girlfriend a vulgar name. RP 276-279, 478-483, 768. Two witnesses stated that the appellant gave his girlfriend a knife immediately after the stabbing, stating he had hurt someone, and then fled the scene. RP 770-772, 483-485. The autopsy showed that the victim had been forcefully stabbed in the heart, with the blade having been thrust through the bone of the sternum up to its hilt. RP 949-958. Notably, there was no testimony that the victim had somehow fallen on the knife, that the stabbing was an accident, or that the appellant did not intend the natural consequences of his actions. Instead, all the evidence showed an intentional act by the appellant, and that he then took pains to conceal his crime by disposing of the weapon, fleeing the scene, and hiding his bloody clothes.

As in Perez-Cervantes, there was simply no evidence that would have affirmatively shown the appellant had injured the victim with the knife in a reckless manner. Indeed, the appellant's actual defense at trial was that he was not the person who had stabbed Mr. Garner, an identity defense. RP 1080-1085. Given the factual requirements for the Workman test, and the evidence in this case, it cannot be said that the trial court's refusal to instruct the jury was so "manifestly unreasonable" as to

constitute an abuse of discretion. Stenson, 132 Wn.2d at 701. This Court should uphold the decision of the trial court, finding that manslaughter was not a lesser offense based on the facts of this case.

Finally, even if this Court should find the trial court erred, any error was harmless. Had the jury been instructed on manslaughter as a lesser included offense, it would have also been instructed to only consider that offense if not satisfied the appellant was guilty of murder in the second degree, or being able to agree on a verdict for that offense. As the jury returned a guilty verdict for murder in the second degree, the jury was clearly convinced of the appellant's guilt for that charge, and would not have reached the lesser offense in any case. See State v. Grier, 171 Wn.2d 17, 41-44, 246 P.3d 1260 (2011).

II. The Prosecutor Did Not Commit Misconduct In Closing Argument.

The appellant argues the prosecutor engaged in misconduct during closing argument by allegedly misstating the burden of proof and impugning the role of defense counsel. However, these remarks were either not improper or cannot be shown to have affected the jury's verdict. As such, the Court should decline to reverse on these grounds.

When a claim of prosecutorial misconduct during closing argument is asserted, the defendant bears the burden of proving the prosecutor's

conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Thorgenson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); State v. Emery, 174 Wn.2d 741, 756-758, 278 P.3d 653 (2012).[1] The burden of establishing prejudice requires "the defendant to prove that there is a substantial likelihood that the instances of misconduct affected the jury's verdict." Thorgenson, 172 Wn.2d at 442-443 (internal quotation marks removed). The court reviews the effect of allegedly improper comments not in isolation, but in the context of the total argument and the issues in the case. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

The failure to object to an improper remark "constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). The wisdom underlying this rule is so that a party may not "remain silent at trial as to claimed errors and later, if the verdict is adverse, urge trial objections for the first time in a motion for new trial or appeal." State v. Bebb, 44 Wn.App. 803, 806, 723 P.2d 512 (1986); see also Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960) ("If

[1] A different standard of review, constitutional harmless error, applies to prosecutorial comments on the right to remain silent or appeals to racial bias. Emery, 174 Wn.2d at 757.

misconduct occurs, the trial court must be promptly asked to correct it. Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.") As there was no objection during the arguments, the appellant may not belatedly seize upon these claims to overturn the jury's verdict.

a. The Prosecutor Did Not Make an Improper "Fill in the Blank Argument."

The appellant contends the prosecution engaged in misconduct by making an improper "fill in the blank" argument regarding reasonable doubt. However, this claim mischaracterizes the actual arguments made by the State, and does not require reversal.

An argument that in order for the jury to find the defendant not guilty it must first be able to "fill in the blank" with a reason for the acquittal is improper. Emery, 174 Wn.2d at 759-760. This argument is improper because it shifts the burden of proof to the defense, and implies that the default decision for the jury should be "guilty." Id. Here, contrary to the appellant's claims, the State did not make such an argument. The actual argument was as follows:

> So when you look at the evidence, when you compare it to the instructions, you will ask yourself, "Well, how convinced do I have to be? What does the State have to have shown in order for us to find the Defendant guilty?" Well, Judge Evans defines this for

> you. The State doesn't have to prove the case to you beyond any doubt, beyond the shadow of a doubt, beyond a scientific certainty. It has to be proven to you beyond a reasonable doubt. And Judge Evans defines that for us. A reasonable doubt is a doubt for which a reason can be given. If in your deliberations you have doubts, but you can't put them into words, you can't articulate them, you can't talk with your fellow jurors about them, other than just maybe I have some kind of doubt but I can't really express it, that's not a reasonable doubt. That's not a doubt that the law requires you be convinced beyond. If you have a belief in the Defendant's guilt that endures, that lasts, that abides, then you are convinced with that abiding belief that he is guilty.

RP 1052-1053.

Contrary to the appellant's claims, and unlike the argument found improper in Emery, the prosecutor did not imply that the burden was on the defendant to prove he was not guilty. Instead, the prosecutor's argument appropriately directed the jury's attention to the definition of reasonable doubt provided by the trial court. RP 1028-1029, WPIC 4.01. Unlike in Emery, the prosecutor did not phrase the question as "In order for you to find the defendant not guilty" but rather as "What does the State have to have shown in order for us to find the defendant guilty?" This argument was entirely proper, and it is not misconduct for the State to point out that reasonable doubt is a "doubt for which a reason exists." Emery, 174 Wn.2d at 760. It would be a remarkable outcome if a prosecutor engages in misconduct merely by reiterating an instruction given by the trial court and drawn from the pattern instructions. The Court

should find the State did not engage in prosecutorial misconduct or otherwise misstate the burden of proof.

b. The Prosecutor Did Not Disparage the Role of Defense Counsel.

Next, the appellant claims the State engaged in misconduct by "disparaging the role of defense counsel" in closing argument. However, in actuality the State merely responded to claims made by the defense in closing, and did not engage in any misconduct requiring reversal.

In closing argument, defense counsel made salacious and unsupported claims that the police and the prosecution had colluded with various witnesses to falsely accuse the appellant. Regarding Lee Pope and Andy Redmill, the appellant argued:

> He told you that the *police tried to get him to say* that he saw things he didn't see, to get him to say that he remembered things that he didn't remember. And, you know, when you think about it, there's just no doubt that that really happened. Just think how it happened. RP 1061.
>
> Well, he is filling in the blanks with what he knows. You know, *when the State asked him*, you know, "Where did he stab him?" You know, he didn't say the chest,"Stabbed him in the heart." *How do you suppose he knows that?*
>
> Andy Redmill has lied about this case from beginning to end. You know, Lee Pope made a mistake that night by joining in with what his buddy Andy Redmill said. But at least he admitted later that he didn't see the things he claimed to have seen. *Andy Redmill lied.* When he got caught he told other lies. RP 1064.

RP 1061-1064 (emphasis added).

Regarding Tasheena Woodward, the appellant argued her testimony was the result of coercion and pressure by the prosecution:

> Now, Tasheena, she's, you know, Mr. Mack's ex-girlfriend. She said that night that she was agreeing with whatever the officers said so she could go home. And when she testified, what was her situation? She had come here on Monday, thrown in jail, and *knew she couldn't go home until she testified for the prosecutors*. Very same thing. *Tell them what they need to hear* so I can go home. And that's really all you need to know about her testimony.

RP 1067 (emphasis added).

Regarding Rhonda Naillon, the appellant again claimed the State had colluded with her to provide false testimony:

> And then she says something out of the blue, something about maybe that guy had on a black shirt before the stabbing, and a white shirt after. And I apologize folks, that made me mad.
>
> And there's only one explanation for this changing shirts business, and we know what it is. *She knows the State has a problem here. She knows that the video from that night* shows Mr. Mack in a black t—shirt, and in nothing but a black t—shirt, and that she said a guy in a white sleeveless t—shirt. And Nicole said a guy in a white sleeveless t—shirt. *And she tried to fix that*. You know, but she also admitted she had seen this guy for maybe 5 to 8 seconds in her life. *But she tried to fix it.*

RP 1068, 1070 (emphasis added).

Regarding Leonard Jordan, "Tattoo Jimmy", the appellant once more claimed the police had colluded with him to falsify his testimony:

> And why is that? *Because it's just a story*. Remember he left the bar because he thought he had warrants. He only came back once his buddies told him, "Don't worries, the police aren't worried about your problems." So when he went back he knew he-- at that time, he thought he had problems. *So to avoid problems, he fell in line, told the police what they wanted to hear.*

RP 1074 (emphasis added).

Regarding Nicole Johnson, the appellant argued the State and conspired with her to suborn perjury:

> And of course on her direct exam, *if you remember his questions* were really over – *the State and her started working on swearing off that written statement she gave.*
>
> *And what did she and the State -- what's the best they could come up with*?

RP 1080. 1081 (emphasis added).

As these examples make plain, the persistent and recurring theme of the appellant's closing argument was that the prosecution and police had willfully and maliciously plotted with the witnesses to falsely accuse him of Mr. Garner's murder. Essentially every witness that had incriminating information about the appellant was lumped into a conspiracy orchestrated by the State. As these issues were advanced by the appellant, it is not misconduct for the State to respond to defense counsel's argument, or to argue that the evidence does not support the defense's theory. State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994). Such a

response was necessary, given the personal nature of the defense attacks, lest the jury take silence for some sort of admission of wrongdoing by the prosecution.

In response to these arguments, the State's rebuttal included these statements, which the appellant now complains are misconduct:

> MR. SMITH: It doesn't matter what the evidence is. Instead we get a story. And it was a humdinger. It was quite a tale. It was witnesses conspiring. It was sinister deeds by the Longview Police Department. Coercion of witnesses. Perjury. Planting of evidence. Implications the police are doing bad things. Everybody is conspiring against Mr. Mack. You see, that's a nice way -- a polite way of saying what that is, is I'm making it up as I go along. Because that's just words, ladies and gentlemen. That's just words. There's no evidence of conspiracies, perjury. You can say whatever you want, but you have to base your decision on the evidence. The claims are just words. You can tell a million stories, but you have got to look at the evidence.
> Now, why are we hearing about conspiracies? Why is it blame the police? Why is it the police are conspiring? Mr. Smith is part of a conspiracy, you know, Mr. Brittain is part of it. Everybody is piling on. Everybody wants to cook a story. We want to get Mr. Mack. You can say whatever you want, but if you are going to make an outrageous claim like that, you better bring the goods and we didn't hear a word. There has been no proof of any of that. Any why –
>
> MR. MULLIGAN: Objection, Your Honor.
>
> MR. SMITH: Are they making all this up?
>
> MR. MULLIGAN: (Inaudible) Mr. Pope.
>
> JUDGE EVANS: So, the jury is instructed to rely on your memory as to the evidence.
>
> MR. SMITH: Now, why are they making all of this

> up? It's a smoke screen, because they got to get the attention off Mr. Mack and they have got to put it somewhere else. So they want to do that. Why do they need to do that? They need to do that because the evidence, and we are talking about the real evidence here, has Mr. Mack boxed in. He's stuck. Three people saw him stab a man. Two people saw him with a knife and heard him admit to it. His blood is on the clothes. He runs away to Arizona. So let's come up with a story. And it was a good one. It could have been a John Grisham novel, it could have been a Lifetime movie, but it's not the evidence. The evidence is what we are talking about here. The eyewitnesses, the three folks that see it happen. Tasheena, Jimmy, his words, "I hurt somebody bad. I've got to take off. I'll jump the fence." The physical evidence. The DNA, the blood on his shorts, the blood in the pocket.

RP 1087-1089.

Notably, the appellant did not object to the vast majority of these statements. Also, rather than "disparaging defense counsel", these remarks appropriately focused on the fact that there was a distinct lack of evidence to support the various claims made in the defense closing. There is a crucial distinction between attacking counsel personally and attacking counsel's arguments and theories. The first is improper, while the second is the heart of a rebuttal argument. The State also sought to point out the jury, properly, that the arguments and words of the attorneys were not the evidence, and that their decision should be guided by the actual trial testimony and evidence. This argument was in accordance with the trial court's instructions. RP 1026.

The State also made the following remarks, which were again unobjected to:

> Now, I was writing stuff down as we went along, and a lot of this has to do with conspiracy theory stuff. You know, the Prosecution is cooking it up, the police are cooking it up. You know, I think we can rely on our common sense to let us know that that's not what's happening here. That's a lot of cynicism from the Defense. There is a denigration of the police. There's a denigration of the State. There's even personal assault -- insults against witnesses. Leonard Jordan, he's got tattoos, don't believe him. People call him Tattoo Jimmy. You can't believe that. That's just insults. If you don't have anything better to do, if you can't attack the man's story, because they can't lay a glove on Jimmy. There's no reason for him to make it up. There's no reason for him to incriminate him. They have got nothing. They can't impeach his testimony in any way. So what they say is, "This guy has a nickname, so don't believe him." They are just grasping at straws, because it's all they got on him.

RP 1094-1095. As with the prior statements, this line of argument was proper, as it focused on why the jury should, contrary to the appellant's claims, find the testimony of Mr. Jordan credible. Such an argument is clearly proper, as the prosecutor has great latitude to argue the credibility of witnesses, particularly where drawn into question by the defense. Thorgerson, 172 Wn.2d at 448.

The appellant argues the State engaged in misconduct by pointing out that his argument that Mr. Pope and Mr. Mitchell had actually stabbed Mr. Garner was "thrown out there" without evidentiary support and that this was "finger pointing" by the defense. These remarks were not

objected to. RP 1095, 1097. The appellant provides no authority to suggest why it would be improper for the State to point out that the defense's theories lack evidentiary support. Indeed, that is the goal of rebuttal. See Russell.

Finally, the appellant argues that State denigrated defense counsel by arguing:

> Well, the testimony is he sneaks in, he stabs him, he sneaks out quickly. Everybody else is focused on the brawl. He sneaks in, he gets in and gets out. But really they don't care about that, because I will tell you something. If Meece and Connolley had seen it, they would just be part of the conspiracy, because that's the beauty of the conspiracy theory is it requires no proof. It requires no evidence. I just say it, and you are supposed to believe it. They don't really care what any of these witnesses have to say, but if they have anything bad to say they are in a conspiracy, and you can't believe them. They are just picking and choosing. They are making it up as they go along. But the evidence keeps boxing them in, and it is pointing to his guilt, unmistakably.

RP 1097. Rather than denigrating defense counsel, this argument was again simply pointing out that the appellant's argument lacked any support in the evidence, and again referred the jury back to the actual evidence in this case. Also, this argument was in direct response to the various claims made by the defense in closing that the witnesses with incriminating information against the appellant were part of a conspiracy against the appellant. In any event, the appellant did not object to these remarks.

When viewed in the full context of the trial, the appellant has failed to demonstrate that the remarks complained of were improper, instead of being in response to his arguments and in accordance with the evidence and instructions. The appellant bears the burden to do so. Also, the appellant failed to object to the vast bulk of these remarks, thus undermining his current claims of their prejudicial effect.

However, even if these remarks were improper, the appellant has failed to show that they were so "flagrant and ill intentioned" that no instruction would cure them. Significantly more inflammatory statements have been found to be subject to curative instructions. See State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008) (arguments that defense attorney had taken the facts and twisted them, while hoping the jury was not smart enough to catch on, and egregious misstatement of the burden of proof could have been cured).

Furthermore, the appellant has failed to show that these comments, in the context of the entire trial, had a "substantial likelihood of affecting the jury verdict." As noted previously, three witnesses testified to watching the appellant stab the victim the chest. RP 383-389, 501-512, 900-904. The appellant had a clear motive to harm the victim, due to the prior argument and insult levied against his girlfriend. RP 276-279, 478-483, 768. Two witnesses, including the appellant's former girlfriend,

testified he had a knife immediately after the stabbing, had statements he had hurt someone, and then fled the scene. RP 770-772, 483-485. The appellant discarded bloody clothing as he fled, clothing that was linked to him by DNA and found to contain the victim's blood. RP 835-873, 469-470. The appellant fled the scene of the crime, entered his home surreptitiously to kiss his child goodbye, and then fled the state. RP 580-585, 743-746. No one else was seen with a knife immediately after the incident. Also, no other person abandoned bloody clothes while fleeing the scene.

In the face of such substantial evidence of guilt, the appellant cannot meet his burden of showing that these allegedly improper comments would have affected the jury's verdict. This conclusion becomes even more inescapable given that the sole issue at trial was the identity of the person who had killed Mr. Garner. When the evidence outlined above is considered, it is plain that the appellant's guilt was established overwhelmingly and any impolitic remarks were not the cause of his conviction.

III. The Trial Court Did Not Abuse Its Discretion By Excluding Cross-Examination of Lamson on Irrelevant Matters.

The appellant argues that his right to confront the witnesses against him was violated by the trial court's exclusion of the fact a State's

witness, Larry Lamson, had been prosecuted for failure to register as a sex offender and had received a plea bargain. However, the trial court was within its discretion to exclude this evidence, as there was no showing of any connection between Lamson's testimony in the appellant's case and the plea offer he had received. Furthermore, the exclusion of this evidence, even if in error, was harmless and could not have prejudiced the appellant in any meaningful fashion.

On appeal, this Court reviews the admission or exclusion of evidence under an abuse of discretion standard. State v. Baldwin, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs only when the trial court's decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); quoting State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Here, the appellant sought to impeach Lamson with a wholly speculative connection between information he gave the police during the 2009 murder investigation and a plea bargain he received in a later prosecution in 2010. The only "evidence" of a connection between the two was the coincidence that one of the deputy prosecutors handling the appellant's case had, prior to becoming involved with the appellant's prosecution, handled Lamson's case. However, this prosecutor explicitly

denied any link between the appellant's case and Lamson's deal, explaining that he had no knowledge of the appellant's case at the time Lamson's case was negotiated. The appellant offered no evidence whatsoever to the contrary, and the argument was merely an innuendo of undisclosed malfeasance by the State.

Importantly, the right to cross examine witnesses is not absolute. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). Trial courts may "within their sound discretion, deny cross-examination if the evidence sought is vague, argumentative, or speculative" or otherwise irrelevant. Darden, 145 Wn.2d at 620-21; State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965). Furthermore, a court may refuse to allow cross-examination that tends only remotely to show bias or prejudice. State v. Roberts, 25 Wn.App. 830, 834, 611 P.2d 1297 (1980).

Here, Lamson's prior conviction for failure to register as a sex offender would not be admissible to impeach his credibility. ER 609. If there was some showing that the plea bargain he received was connected to his testimony in the appellant's case, this would be admissible to show his bias. However, given the lack of *any* evidence showing a connection between Lamson's 2010 case and the appellant's prosecution, it cannot be said that the trial court engaged in a manifest abuse of discretion, or based its ruling on untenable grounds as required for the appellant to prevail. See

Stenson, 132 Wn.2d at 701. Rather than an abuse of discretion, the record indicates the trial court carefully considered the proffered testimony and ultimately found it so lacking in probative value that it should be excluded. RP 791-792. This record does not even approach the level of proof required for the appellant to persuade this Court the trial judge committed a manifest abuse of discretion.

Finally, should this Court find the exclusion of this testimony was somehow improper, any error was harmless. The only testimony offered by Lamson was that Ms. Woodward had told him she received a knife from the appellant. However, Ms. Woodward herself testified to these facts at trial, as did Mr. Jordan. Lamson was extensively impeached with his admittedly poor memory, mental health issues, and bizarre statements. To argue that the exclusion of this additional impeachment material, which was vague and sketchy at best, would have swayed the outcome is simply not credible. When the totality of the trial is considered, any error that did occur was harmless. See State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996); United States v. Martin, 618 F.3d 705 (7th Cir. 2010).

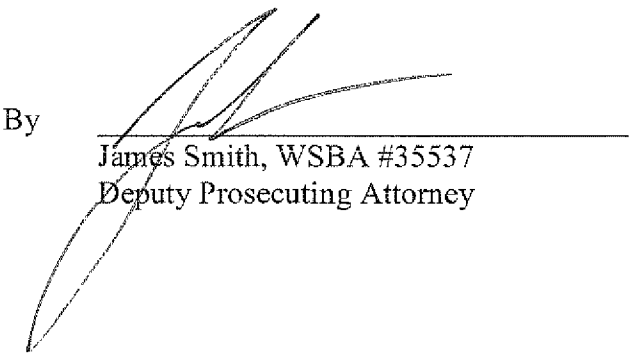
VI. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court to deny the instant appeal. The appellant has failed to show the trial judge abused his discretion, or that prosecutorial misconduct occurred

and affected the outcome of his trial. The State asks this Court to affirm the judgment and sentence in this cause.

Respectfully submitted this 18th day of September, 2012.

Susan I. Baur
Prosecuting Attorney
Cowlitz County, Washington

By 

James Smith, WSBA #35537
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Jodi R. Backlund
Attorney at Law
P.O. box 6490
Olympia, WA 98507
backlundmistry@gmail.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on September 19th, 2012.

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

September 19, 2012 - 9:55 AM

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